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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 272010

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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ELCON CONSTRUCTION, INC.

Appellant

v.

EASTERN WASHINGTON UNIVERSITY

Respondent

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APPEALED FROM SPOKANE COUNTY SUPERIOR COURT  
CAUSE NO. 04-2-05145-7  
THE HONORABLE GREGORY D. SYPOLT

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**APPELLANT ELCON CONSTRUCTION, INC.'S BRIEF**

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**Appendix A**

**Appendix B**

## **I. INTRODUCTION**

Faced with a water shortage in the late 1990s, Defendant Eastern Washington University ("EWU") spent six months and \$30,027.77 conducting a study to determine how to obtain additional water for its Cheney campus. That Water Capacity Study ("Study") concluded that any new well would need to be drilled to 1,500 feet. EWU nonetheless advertised for the construction of two 750' deep wells, to be constructed on a per foot unit price basis. Knowing it would obtain significantly lower bids by using per foot unit prices for drilling, EWU concealed the Study from potential bidders and the actual scope of the necessary work. Plaintiff Elcon Construction, Inc. ("Elcon") teamed up with a subcontractor, Intermountain Drilling, to bid the well project, unaware that EWU intentionally concealed the existence of the Study. Elcon was the successful bidder.

Once the well project was underway, it became apparent that the true scope of work had been misrepresented. Elcon drilled beyond 750', but EWU advised that sufficient water had not been located. Elcon's drilling equipment could no longer be used because

of the depth. When Elcon demanded payment for the added costs it was incurring, EWU terminated Elcon's contract for EWU's convenience. EWU later unilaterally attempted to "convert" the termination for convenience to one "for default," claiming it owed Elcon nothing. A lawsuit was filed based on EWU's failure to pay Elcon's termination for convenience pay request and the damages caused by EWU's tortious conduct.

Based upon the contract, EWU moved the Superior Court to stay the *entire* action pending arbitration. However, the Court stayed *only* the contract causes pending arbitration to determine what, if any, payments Elcon was owed under the contract for the termination for convenience. Elcon's tort claims and statutory rights, if any, per the Court's Order, were not submitted to the Arbitrator.

At arbitration, it was found that EWU had failed to pay Elcon amounts owed based on the termination for convenience. After arbitration, Elcon requested the Court to award statutory interest triggered by the Arbitrator's ruling, or alternatively, to direct the Arbitrator to decide the issue of statutory interest. Inexplicably, both

the Arbitrator and the Superior Court claimed lack of jurisdiction to award statutory interest, depriving Elcon of any forum to have its statutory rights addressed.

After its motion was denied, Elcon litigation continued on the tort claims. The Trial Court denied EWU's motion for summary judgment. However, after a new judge was assigned to the matter, EWU's Renewed Motion for Summary Judgment was improperly granted. This appeal was filed in order to redress the statutory interest issue and to resurrect EWU's valid tort claims.

## **II. ASSIGNMENTS OF ERROR**

### **A. ASSIGNMENTS OF ERROR.**

1. The Trial Court erred by granting EWU's Renewed Motion for Summary Judgment dismissing Elcon's Fraud and False Light Publication Claims.
2. The Trial Court erred by granting EWU's Motion for Summary Judgment dismissing Elcon's Tortious Interference cause of action.
3. The Trial Court erred by denying Elcon's Motion for statutory interest.
4. Alternatively, the Trial Court erred by denying Elcon's request to direct the Arbitrator to decide the issue of statutory interest.

**B. ISSUES PRESENTED.**

1. Whether fraudulent concealment resulting in a party being induced into a contract, is an exception to the Economic Loss Rule?
2. Whether genuine issues of material fact existed with regard to the justifiable reliance element of Elcon's Fraud allegations?
3. Whether genuine issues of material fact existed with regard to the damages Elcon incurred as a result of EWU's intentional interference with its contractual relationships?
4. Whether genuine issues of material fact existed with regard to Elcon's publication in a false light cause of action?
5. Whether a public works contractor is entitled to statutory interest when the Public Body does not pay owed contract amounts?
6. Whether a Superior Court retains jurisdiction to decide statutory rights not submitted to or decided by Arbitration?
7. Whether a public works contractor is entitled to an award of statutory interest upon confirmation that a contract pay request was owed but not paid?
8. Whether a Superior Court retains jurisdiction to decide the issue of statutory interest after an Arbitrator confirms contract payments being owed?
9. Whether a Superior Court retains jurisdiction to decide the issue of statutory interest when that issue was not previously submitted to or decided by Arbitration?

### **III. STATEMENT OF THE CASE**

#### **A. FACTUAL OVERVIEW.**

##### **1. Prior To Bidding, EWU Conducted A Water Capacity And Hydrogeological Investigation.**

EWU operates its own water supply system and had water right certificates dated 1968, 1976 and 1984 relating to two wells operating prior to 2003. CP 548. The 1984 certificate provided that EWU's total water rights under the three certificates could not exceed 750 gallons per minute. Id. As a result, prior to 2003, EWU's total water rights were limited to 750 gpm. Id. In 1996 EWU filed a request with the Department of Ecology seeking permission to increase its water rights and change the way the water rights could be used.

In 1999, EWU hired Varela & Associates ("Varela"), an engineering firm, to produce a Water Capacity Study ("the Study"). CP 624-636. The scope of Varela's work included identifying and evaluating alternatives for EWU to meet future water needs. CP 630. The Study included an in-depth analysis of how to develop additional groundwater capacity either from EWU's existing wells or potentially from a new well. CP 534-607. EWU's employees

worked closely with Varela to determine the scope of the Study, to provide information to Varela, and to provide input on the Study, including drafts. CP 608-622.

Steve Bloom, EWU's engineering supervisor, worked closely with Varela on the Study. CP 608-623. Later, Bloom was involved in the design and bidding of the Well project at issue. CP 695-696. EWU's contract with Varela defined the scope of the Study:

*Develop additional groundwater supply.*

*The intent of this alternative is to provide preliminary determinations of:*

- *The hydrogeologic potential of obtaining additional water supply on campus.*
- *The potential and time line for obtaining necessary water rights.*
- *The feasibility and advantages/disadvantages of increasing the capacity of existing wells or utilizing the red barn well in lieu of drilling a new well.*
- *Estimated construction costs.*

CP 630-631(emphasis added). Varela requested a substantial amount of data from EWU for the Study. CP 637-638. This included requesting "*existing area hydrogeo studies, other studies,*

*reports, etc.”* and any other information about the local hydrogeology. Id.

Varela provided nine copies of the Study to Steve Bloom of EWU. CP 649. Varela explained, “...*the report lays out fairly specifically the steps the University should take to begin the process of developing adequate water supply.*” Id. The Study contained critical information about what would be required to obtain water from the Grand Ronde Aquifer on the EWU campus.<sup>1</sup> CP 564-588.

Varela hired Golder & Associates, Inc. to perform a Hydrogeological investigation (“Golder Report”) that it included as a basis for and part of the Study. CP 316-356. The Golder Report, was also provided to EWU as part of the Study. It was performed with the assistance and review of EWU employee Dr. John Buchanan. CP 702. The Golder Report was performed to determine if additional water supply could be obtained by: “(1) *increasing the capacity of EWU Well 1 and/or EWU Well 2; or, (2) by drilling a new well located on campus.*” CP 319. The Golder Report

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<sup>1</sup> Attached as **Appendix A** is a summary of excerpts showing the type of critical information included.

disclosed significant information about the potential construction of a Grand Ronde well on EWU's campus.<sup>2</sup> CP 316-356.

As a result, EWU had a plethora of information about the local hydrogeology, the depths necessary to obtain water from a new Grande Ronde well, and the limited likelihood of successfully obtaining water from a campus well. Supra.

In April 2002, Varela contacted EWU's Steve Bloom to return files it had been provided for the Study. CP 650. Notably, Varela told Bloom it was available to assist if EWU's new consultant "*would like any input or have any questions re: the Study or related water system issues... .*" Id. Bloom, EWU and TD&H never contacted Varela to provide input or answer questions in designing the Well project. CP 682-718.

## **2. The Design And Pre-Bid Of The New Well Project.**

Consequently, at the end of 2002, EWU decided to drill two *new* campus wells into the Grand Ronde Aquifer. CP 695-698. The well Project had become urgent for EWU because the Seattle Seahawks had leased the EWU facility for use as a training camp for

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<sup>2</sup> Attached as **Appendix B** is a summary of excerpts from the Golder Report.

the upcoming season, the existing wells could not provide the necessary water, and it was facing the potential of losing funding in its budget. CP 716. Simply put, EWU felt that it needed to bid the project quickly. CP 695. EWU next met with TD&H to help design the wells to be constructed. CP 671. EWU and TD&H decided the design parameters for the new wells which included specifying two 750' deep wells to be bid on a per foot unit price basis. Id. Purportedly, neither TD&H nor EWU have since been able to explain why they designed two wells drilled only to 750' deep when the Study told them a new well needed to be 1500' deep. CP 703-704; 740. Yet, the 750' depth was used as both the "*pre-design*" depth and the "*design*" depth. CP 651-655; 666-667. This depth was represented to Elcon and other potential bidders as the scope of the Project. CP 678-680.

The depth here is critical because as it increased, the type of necessary drilling equipment needed to drill deeper, changes. Drilling at 1,500', as the Study indicated, requires special drilling equipment not commonly found in this region. See e.g. CP 713-714. Prior to the bid, EWU was informed only a limited number of well

drillers in the area were capable of drilling to 750' at the diameter EWU wanted. CP 662. EWU also knew the most recently drilled well near its campus was extremely deep and required special equipment from Texas to be brought in to do the drilling. CP 713-714.

Nonetheless, EWU specified that the wells would be expected to be drilled to 750' deep, and that the contractor would be paid on a unit price basis for each foot of well depth drilled. At the same time, EWU specified the contractor would be required to keep drilling beyond 750' deep if water was not reached at that elevation. CP 306. Additionally, EWU placed significant limitations on remedies in the event of a claim based on the contract. CP 92-102. Of course, based on the Study, EWU knew that a claim was likely since the Study indicated a well of 1,500' deep was required to obtain water.

Even though EWU possessed the knowledge and information describing in detail the hydrogeology and problems with obtaining water from a campus Grand Ronde well, it hid that information from its engineer, TD&H. CP 730-735. Despite the fact EWU knew that the type of equipment necessary for drilling a 750' is significantly

smaller and less costly than equipment required to drill to a greater depth, the information from the Study was not even discussed during the design of the project. CP 713-714.

### **3. The Bidding Of The Project.**

EWU produced project specifications that intentionally misrepresented to potential bidders that the scope of the drilling on the Project was two wells; each 750' deep, through basalt and clay. CP 678-680. EWU also expressly misrepresented *that the only geological information* available to the bidders was a well log and video for existing EWU wells located in a completely different aquifer! CP 864-865. This is important because the new well was going to be drilled into the Grande Ronde aquifer while the existing wells were located in the Wanapum aquifer. CP 624-636. EWU did not disclose to potential bidders, or even to TD&H, the Study or the Golder Report which described the local hydrogeology and explained the remote likelihood of being able to increase the capacity of the existing wells. CP 534-607; 316-356.

Intermountain Drilling was contacted by TD&H and asked to bid the project. CP 864. After reviewing the specifications that

represented the well would only require drilling to 750', Intermountain Drilling teamed up with Elcon to prepare a bid on the well Project. On behalf of Elcon, Intermountain Drilling contacted EWU and asked for all of the information EWU had relating to the Project, any other wells in the area, or the geology of wells in the area. CP 864-865. EWU again misrepresented that the only information it had was an old well log and video from EWU's existing Well Number 2 and a video of the existing wells, located in a completely different aquifer. Id. Intermountain Drilling followed EWU's direction and contacted TD&H to obtain the information. CP 864-865. Intermountain asked TD&H for all of the information EWU had relating to the wells in the area and the underground conditions. TD&H only provided the well log and video for the existing wells. Id.; CP 663-665. Later Elcon itself asked if any water studies existed and EWU again misrepresented that none did! CP 673.

The well Project was originally scheduled for an April 17, 2003 bid date. CP 268. However, EWU learned that there would be few or no bids submitted, so it delayed the bid date. To further

induce contractors to bid, EWU allowed more construction time for the successful bidder to complete the Project. Id.

#### **4. The Construction.**

Based on information provided, Elcon and Intermountain Drilling provided a bid for the Project and were the successful bidders. Elcon scheduled the completion of the first well for November 14, 2003, five months after Project start. CP 268. As construction progressed, Elcon informed EWU that conditions were significantly different than those represented in the contract documents and the bore log of EWU's existing well.

While the conditions were unforeseen by Elcon, they were not unforeseen by EWU. Only later, during the course of construction, did Elcon learn that EWU possessed comprehensive geological investigations and studies prior to bid. CP 269. After four public records requests, Elcon finally received the Study and the Golder Report confirming EWU's pre-bid representations and those made during construction, as blatantly and intentionally false. Supra. Nonetheless, Elcon was ordered by EWU to continue drilling beyond the 750' depth. When Elcon insisted upon payment for its

increased costs of drilling, EWU decided to terminate Elcon's contract for EWU's convenience. CP 106.

**B. PROCEDURAL HISTORY.**

**1. Elcon's Attempts To Get Paid.**

**a. Elcon's Termination for Convenience Claim.**

On April 15, 2004, EWU terminated its contract with Elcon for its convenience. CP 106. When it did so, as required by the contract, EWU instructed Elcon to submit a pay request for the work performed prior to termination. Id. Elcon submitted that pay request on June 4, 2007. CP 107. By the terms of the contract, EWU was required to render a decision within 60 days of the claim. CP 109. At EWU's request, Elcon allowed the Project records to be audited. CP 109. The document review was scheduled for August 6, 2004 and EWU indicated it would provide a response by September 7, 2004. CP 111-112. EWU did not provide a response. CP 113. Instead, on October 22, 2004, EWU indicated it was "*converting*" the termination into one for "*default*". CP 114.

**b. Tort Claim.**

On October 29, 2004, Elcon filed a tort claim with the State of Washington based on EWU's tortious conduct including its Fraudulent Concealment of the Study, Fraudulent Inducement, Tortious Interference, and Publication In a False Light. CP 70-75.

**2. The Litigation.**

On November 3, 2004 Elcon filed suit based upon the contract and its statutory rights. CP 3-16. In its Prayer for Relief, Elcon requested "*pre-judgment interest as provided for by law*". CP 16. Elcon later filed an Amended Complaint adding its tort causes of action. CP 17-33. EWU responded by moving to "*dismiss or stay*" the entire action based on the Economic Loss Rule and the arbitration provision in the contract. CP 34-41. The Court denied EWU's Motion to dismiss the tort claims. CP 221. The Court further ruled that only a portion of the litigation would be stayed, pending arbitration of the issue of whether money was owed under the contract. Only the "*contract claims*" were stayed "*pending arbitration*". CP 222. The parties then submitted the termination for convenience/termination for default dispute to arbitration. The

Court retained the remaining claims, including Elcon's statutory rights, for later adjudication.

### **3. Arbitration Of EWU's Termination For Convenience.**

In Arbitration, Elcon's position was that EWU breached its contract by refusing to make payments owed as a result of EWU's termination for convenience. CP 927-932. On the other hand, EWU claimed that due to its "conversion" to a termination for default, it did not owe any contract payments, but rather Elcon owed it money. Under the contract, this dispute was to be decided by arbitration.

The parties participated in arbitration with James Craven, Esq. as the Arbitrator. CP 385-386. On December 16, 2005 Arbitrator Craven issued an Award establishing that Elcon was owed a contractual payment based upon Elcon's June 4, 2004 pay request. CP 249-50. The Award did not address interest or attorney fees. Id. As a precautionary measure, within twenty days of the Award, Elcon filed with the Arbitrator a Post-Award Motion for Attorney Fees, Costs and Pre-Award Interest. See CP 387. This included a request for common-law prejudgment interest. On January 30, 2006, the

Arbitrator ruled he did not have jurisdiction to hear the motion, thus, confirming Statutory Interest was an issue for the Court. Id.

**4. The Arbitration Award Established Elcon's Right To Statutory Interest.**

Elcon then filed a motion with the Trial Court seeking statutory interest, or in the alternative, remand of the issue to the Arbitrator directing him to rule on the issue. CP 395-403. The Trial Court erroneously refused to decide the issue and also refused to remand it to the Arbitrator. CP 1019-1020. This, despite the fact that the Arbitrator was never directed by the Court to decide the issue of statutory interest as part of the arbitration, thus leaving Elcon without redress. This appeal seeks to have the issue decided.

**5. Elcon's Tort Causes Of Action.**

Following Arbitration, the litigation continued so the remaining issues could be resolved. Although the Court had previously denied EWU's motion to dismiss, EWU filed a Motion for Summary Judgment, again seeking to dismiss Elcon's fraud claims based on the Economic Loss Rule. CP 359-376. The Court correctly denied EWU's Motion, finding the Economic Loss Rule did not apply. The Court also determined that genuine issues of

material fact existed with regard to all of the elements of fraud. CP 1017-20. However, the Court erred by granting summary judgment on Elcon's Tortious Interference claim by finding there was no evidence of damages. CP 1018.

Almost two years later, the matter was reassigned to a new Judge. At that point, EWU re-filed its Economic Loss Rule motion which had been twice denied. CP 1088. The new judge erroneously changed the prior rulings and found that the Economic Loss Rule barred claims for fraudulent concealment and fraudulent inducement. CP 1379-1384. Elcon's Publication in a False Light Cause of Action was also dismissed finding that no issue of fact existed with regard to publication. This eliminated the remaining causes of action that were pending for trial. As set forth in the assignments of error, Elcon seeks to reverse the errors committed by the Trial Court to allow the statutory protections it is assured as a public works contractor, and to have a jury decide the intentional torts committed by EWU.

#### **IV. ARGUMENT**

##### **A. EWU'S MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.**

###### **1. Standard Of Review.**

A Trial Court's decision on granting summary judgment is reviewed based on the same inquiry as the Trial Court. Huff v. Buddbill, 141 Wn.2d 1, 7 (2000). Summary judgment should only be granted if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. Commodore v. University Mechanic Contractors, Inc., 120 Wn.2d 120, 123 (1992). The moving party must prove by uncontroverted facts that there are no genuine issues of material fact. Jacobsen v. State, 89 Wn.2d 104, 108 (1977). The Court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the non-moving party. Nationwide Mutual Fire Ins. Co. v. Watson, 120 Wn.2d 178, 186 (1992). In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue of fact exists, not to resolve any factual issues on their merits. Balise v. Underwood, 62

Wn.2d 195, 199 (1963). The summary judgment procedure may not be used to try an issue of fact. Thoma v. C.J. Montag & Sons, Inc., 54 Wn.2d 20, 26 (1959). The purpose of CR 56 is not to cut litigants off from their right to a jury trial. Burback v. Bucher, 56 Wn.2d 875, 877 (1960).

**2. The Economic Loss Rule Does Not Bar Elcon's Fraud Allegations.**

The Trial Court twice rejected EWU's assertion that the Economic Loss Rule barred Elcon's fraud claim. CP 221-23; CP 1017-20. Yet, nearly two years later a new Judge, granted EWU's motion the third time it was raised. CP 1391-1396. However, the Economic Loss Rule does not, and was never intended to, bar allegations based on the type of conduct at issue here. In this case, EWU's fraud consists of two components: 1) EWU intentionally concealed the Study; and 2) it then made affirmative statements that the Study did not exist. CP 864-865; CP 673. The concealment and misrepresentations induced Elcon and other contractors to bid on a Project that was vastly different in scope than represented.

**a. Fraudulent Concealment Claims Are Not Barred By the Economic Loss Rule.**

Under Washington law, a claim of Fraudulent Concealment is not barred by the Economic Loss Rule. Alejandre v. Bull, 159 Wn.2d 674, 689 (2007) citing Atherton Condo. Ass'n Bd. Of Dirs. V. Blume Dev. Co., 115 Wn.2d 506, 523-527 (1990). “[U]nder Atherton, *the Alejandres’ fraudulent concealment claim is not precluded by the Economic Loss Rule.*” Id. (emphasis added).

Here, the basis for Elcon’s fraud claim was the fact that EWU fraudulently concealed the Study from Elcon. CP 17-33. This was done in order to induce Elcon to bid the Project and enter into the contract. As a result, the Trial Court’s determination that Elcon’s Fraudulent Concealment allegation was barred by the Economic Loss Doctrine, was contrary to Washington law and must be reversed.

The Alejandre Court did not directly address the issue of whether a Fraud in the Inducement claim was barred by the Economic Loss Rule. Alejandre, 159 Wn.2d at 690 fn. 6. The interplay between the Economic Loss Rule and a claim of Fraud in the Inducement appears not to have been directly addressed by any

Washington Court. In a recent case, the Washington Court of Appeals, Division I, applied the Economic Loss Rule to allegations of intentional misrepresentation. See Carlile v. Harbour Homes, Inc., \_\_\_\_\_ Wn. App. \_\_\_\_\_, 194 P.3d 280, 286 (October, 2008). However, that case was a construction defect case and there were no facts indicating it involved fraudulent inducement. Id. at 282-283. Furthermore, the Carlile Court specifically limited its decision to apply the Economic Loss Rule to the facts of that case. Id. at 286 (“*Because we have no basis to depart from the application of the Economic Loss Rule **here...***”)(emphasis added). Finally, the Carlile Court did not offer any substantive analysis to support the application of the Rule. As explained below, based upon the public policy underlying Washington Law and the Economic Loss Rule, the Rule should not be applied to bar Fraudulent Inducement claims.

**b. Elcon Was Unable To Negotiate To Allocate The Risk That EWU Had Committed Fraud To Induce The Contract.**

Other Jurisdictions have correctly held that the Economic Loss Rule does not apply in situations where the parties have never been in a position to negotiate the risks. See e.g. Neibarger v.

Universal Cooperatives, Inc., 439 Mich. 512, 525, 486 NW 2d 612 (1992). It is sound public policy that a party should not be required to negotiate based on the assumption the other party may have committed fraud. More importantly, in this case, Elcon was powerless to do so. This was a public works project. As a result, Elcon was required to submit a binding bid based on the terms established solely by EWU. See RCW 39.04, et seq. Therefore, Elcon had no ability to negotiate the terms of the contract to allocate the risk that EWU committed fraud in order to obtain bids. Consequently, the Economic Loss Rule cannot be used to bar a claim of fraud that induces a Public Works contract.

**c. The Economic Loss Rule Should Not Bar Claims For Fraud That Induces a Contract.**

The Economic Loss Rule is a judicially created doctrine developed to “*prevent disproportionate liability and allow parties to allocate risk by contract.*” Berschauer/Phillips Construction Co. v. Seattle School District, 124 Wn.2d 816 (1994). As a result, the policy behind the Rule does not apply in situations where a party commits fraud that prevents the other party from negotiating the allocation of risk. In other words, a party cannot allocate risk in the

formation of a contract if he/she is fraudulently induced to enter into a contract. Washington law has long recognized that a party cannot benefit from using fraud to form a contract.

*[P]rotection is given to one who is injured by falsehood or deception; fraud vitiates everything which it touches, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity. **A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper, and it makes no difference whether the fraud goes to the factum, or whether it is preliminary to the execution of the agreement itself.** ...*

Coson v. Roehl, 63 Wn.2d 384, 388 (1963)(internal citations omitted)(emphasis added). See also Leibergesell v. Evans, 93 Wn.2d 881 (1980)(Law cannot allow contracting parties to deceive one another when there is a duty to act in good faith). Indeed, Elcon was not required to assume that EWU would use deception to obtain bids.

*A man who deals with another in a business transaction has a right to rely upon representations of facts as the truth. ... one who has intentionally deceived another shall not be heard to say that the other person should not have trusted him.*

Scroggin v. Worthy, 51 Wn.2d 119, 123 (1957)(internal citations omitted).

*There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars and which declares them guilty of negligence and refuses them redress whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity.*

Woody v. Benton Water Co., 54 Wash. 124, 127-28 (1909)(emphasis added).

This is why a majority of jurisdictions have held that Fraudulent Inducement claims are not barred by the Economic Loss Rule.

*The ELR [Economic Loss Rule] springs from the concept that there is no duty in tort for a seller to protect a buyer against economic damages other than as provided for in the parties' agreement. But the common law of fraud imposes a duty not to lie in order to trick another into contract, period, end of story.*

“Fraudulent Inducement Claims Should Always Be Immune From Economic Loss Rule Attack,” Florida Bar Journal, April 1, 2001. (internal citations omitted)(emphasis added). See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238 (Fla. 1996)(the Court held “a cause of action for fraud in the inducement of contract is an independent tort and is not barred by the Economic Loss

*Rule.*”; Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, 960 SW 2d 41 (1998)(Court held that the Economic Loss Rule does not bar Fraudulent Inducement Claims); and Giles v. General Motors Acceptance Corp., 494 F.3d 865, 880 (2007)(“*Although the events giving rise to Appellants’ fraud claim did occur in the context of a contractual relationship between the parties, the claim is not a mere contract claim cloaked in the language of tort. Appellants claim fraud in the inducement rather than fraud in the execution or promissory fraud.*”).

Here, EWU convinced the new judge assigned to the case to ignore the very essence of Elcon’s claim. At the heart of Elcon’s claim is the fact that it was induced into bidding, and ultimately entering into, a unit price contract to drill two wells 750’ deep. CP 710; 864-865; and 1166. However, EWU intentionally concealed the fact that it knew the scope of the work would require the drilling of a 1,500’ well. CP 640, 789 and 704. EWU did so with full knowledge that a 1,500’ well required different and more expensive equipment not even readily available in the region. CP 160. Not only did EWU conceal the Study that disclosed the true

scope of work, but when asked for any relevant hydrogeological information, it intentionally misrepresented that none existed. CP 673. Indeed, EWU continued this deceit even when it became apparent that the scope and magnitude of the work was far different than what EWU had represented.

By analogy, its as if an owner knew it needed to build a 110 story building (approximately 1,500' tall) in order for it to be high enough to have a top story view. Yet, contractors in the region only had cranes able to construct a 55-story building (750'). Any crane specifically able to construct a 1,500' building would have to be brought in from Texas at increased costs. Thus, in order to induce local contractors to even bid on the Project at an affordable per floor unit price, the owner engages in misdirection by soliciting bids for two 750' tall buildings to obtain the best per floor unit price, knowing that the Project will be changed once construction commences. In this scenario, not only does the owner conceal the true scope of the work, but he also requires that bidders provide a set price for each floor and agree to be bound by that price until the owner decides there are enough stories built.

That is what EWU did to Elcon. It knew it would need to drill a 1,500' well deep, using specialized drilling equipment not found in the Northwest. CP 160. EWU deceived contractors into bidding a contract for two 750' wells based on an established unit price bid, while requiring them to agree to drill until they obtained sufficient water. CP 1166. Based upon this conduct, EWU cannot be allowed to hide behind the contract it induced Elcon to sign, to avoid the damages caused by its fraud and do so by distorting the Economic Loss Rule. The Economic Loss Rule simply cannot be interpreted to bar claims for fraudulent concealment when individuals are induced into a contract.

*The tort, after all, is inducing someone to enter a contract, so to say it does not apply where the tort involves the contract or its subject matter analytically makes no sense.*

Budgetel Inns, Inc. v. Micro Sys., Inc., 8 F.Supp.2d 1137, 1146

(E.D. Wis. 1998).

*Fraud in the inducement presents a special situation where parties to a contract appear to freely negotiate-which normally would constitute grounds for invoking the economic loss doctrine-but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's behavior.*

Huron Tool and Engineering Co. v. Precision Consulting Services, Inc., 532 NW 2d 541, 545 (1995).

Consequently, the Trial Court committed reversible error when it dismissed Elcon's claim for fraud based on the Economic Loss Rule.

**3. Genuine Issues Of Material Fact Existed With Regard To The Reliance Element Of Fraud.**

*Question: Was there a hydrogeology report for this project and if there is one we are requesting a copy of it.*

*Answer: No, a hydrogeology report was not prepared for this project.*<sup>3</sup>

The presence or absence of fraud in a given situation is a question of fact. Bland v. Mentor, 63 Wn.2d 150, 155 (1963). The elements of fraud are well established under Washington law. See North Pac. Plywood v. Access Road Builders, Inc., 29 Wn. App. 228, 232, 628 P.2d 482 (1981). Judge Reilly correctly ruled that genuine issues of material existed with regard to each and every element of Elcon's fraud allegations. CP 1017-1020.

*The defendant [sic-the Order refers to Elcon] has raised genuine issues of material fact as to the claims*

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<sup>3</sup> CP 673.

*of fraud and false light and the motion for summary judgment regarding those claims is denied.*

CP 1018(emphasis added). As a result, there is no question that genuine issues of material fact existed with regard to each and every element of the fraud allegation.

Nonetheless, nearly two years later, and based on the very same evidence, a new Trial Judge incorrectly found that no genuine issue of material fact existed with regard to the reliance element of fraud. CP 1395 (“*the evidence of the plaintiff’s justifiable and reasonable reliance on the information provided by the defendant as to subsurface conditions of the earth in the area of work is lacking.*”)

However, Elcon presented admissible evidence that EWU misrepresented the Project specifications, the scope of work and the information available to Elcon and potential bidders about the scope of the work required. EWU misrepresented that the Project required the drilling of two 750’ deep wells. CP 678-681. This misrepresentation was made with the intent of obtaining unit price bids based on that depth from the limited number of drillers in the area who could perform that work. CP 662.

Elcon relied upon these misrepresentations when it submitted its bid. CP 855. EWU's misrepresentation that the wells would be 750' deep was simply false. Elcon also relied upon EWU's misrepresentation that it had provided all information relevant to the Project. CP 864-865. Based on the Study and the Golder Report, EWU knew that it was not feasible to drill a 750' deep campus Grande Ronde Well to obtain 900 gpm. (CP 534 - 607 and CP 16-356). Indeed, the Study advised EWU that a well of that type would need to be up to 1500' deep. Id. EWU also knew that there was only a 20-30% chance of even obtaining water from a Grande Ronde well located on EWU's campus. CP 340. Yet, it chose to misrepresent to Elcon and potential bidders that the Project was for wells 750' deep, to be drilled through clay and basalt, without any sand inter-beds. It did so knowing that bedrock was at 1,500' while concealing this knowledge from Elcon and then contractually orchestrating Elcon's limited ability to later recover actual costs.

Not only did EWU affirmatively misrepresent the specifications and what information was available, but it also withheld the Study and the Golder Report from Elcon. CP 701; 704;

710. Under, Washington law, failure to disclose material facts constitutes the equivalent of the representation of an existing fact for purposes of fraud. See Favors v. Matzke, 53 Wn. App. 789, 796 (1989); Hutson v. Wenatchee Fed. Savs. & Loan Ass'n., 22 Wn. App. 91 (1978); Turner v. Enders, 15 Wn. App. 875 (1975); Sorrell v. Young, 6 Wn. App. 220 (1971); and Perkins v. Marsh, 179 Wn. 362 (1934).

Here, the Study and the Golder Report contained information material to the project. Supra. Yet, EWU did not disclose it to Elcon, potential bidders or even its own design engineer. CP 707, 708 and 710. Instead, it misrepresented to Elcon that the only information it had was a well log and a video for existing wells located in a different aquifer. CP 663; 864; and 865. This was also false. Indeed, EWU flat denied the existence of any hydrogeological study. CP 673.

Elcon as a contractor bidding on a public works Project, had the right to rely upon EWU's representations concerning facts material to the Project. Washington law recognizes that contractors are entitled to rely upon a public entity's representation that it has

disclosed all relevant information. Walla Walla Port District v. Palmberg, 280 F.2d 237 (9<sup>th</sup> Cir 1960)(decided upon Washington law). Indeed, the Walla Walla Port Court found that such a duty exists notwithstanding any disclaimers regarding the type of material to be found. Id. This is consistent with the analysis used by other jurisdictions. Western States v. Sania, 798 P.2d 1062 (1990).

Indeed, in the construction setting, an owner has an implied duty to disclose any information in its possession that is material to the contractor's performance and is not generally available. See Sergent Mech. Syst. v. U.S., 34 Fed. Cl. 505 (1995) and Flexible Metal Hose Mfg. v. U.S., 4 Cl. Ct. 522 (1984); judgment aff'd, 765 F.2d 156 (Fed. Cir. 1985), judgment aff'd, 765 F.2d 156 (Fed. Cir. 1985). This includes the duty to disclose information acquired under prior contracts or developed during preparation for project design. See Jacksonville Port Authority v. Parkhill-Goodloe Co., Inc., 362 So.2d 1009 (1978); and Hardeman-Monier-Hutcherson v. U.S., 198 Ct. Cl. 472, 458 F.2d 1364 (1972).

EWU's obligations here were very different from those of the defendant in Alejandre, supra. Instead, this case is similar to North

Pacific Plywood, supra. In North Pacific Plywood, the defendant, Access Road Builders, assigned a road building contract to Walch Logging. Prior to the contract being entered into, Access represented to Walch that the road to be built was an “old style” road even though Access knew otherwise. North Pacific Plywood, 29 Wn. App at 232. The North Pacific Plywood Court held that the trial court’s finding that Access committed fraud was appropriate. Access argued that Walch should have looked to the public record to discover it had been provided misinformation. The North Pacific Court rejected that argument and pointed out that Walch requested the information, it was not provided and that he had the right to rely upon Access’s representations. Id. at 233. See also Nota Constr. v. Keyes Assoc., 45 Mass. App. Ct. 15, 694 N.E.2d 401 (1998).

Consequently, as a matter of law, Elcon’s reliance on EWU’s representations was justifiable. Owners, and especially public agencies, simply are not allowed to misrepresent facts to bidders and fail to disclose material information. That is precisely what EWU did in this case. As a result, the issue of reliance should have been submitted to a jury and not decided by the Court.

**4. Elcon Submitted Admissible Evidence Of Damages Regarding EWU's Tortious Interference With It's Business Relationships.**

Because this was a public project, Elcon obtained a performance bond for the project. CP 855-856. In April 2004, EWU decided to terminate the contract at issue "for convenience." However, six months later after EWU had learned the full amount of Elcon's claim, EWU decided it was going to "*convert*" the termination into one "*for cause*." CP 852-853. The Arbitrator confirmed this was improper and that EWU's assertions about Elcon's work were baseless. CP 385.

Notably, EWU never asserted any "legal" right it had relative to the bonding company. Instead, EWU unilaterally provided the bonding company and its agent with a copy of the letter claiming it was "converting" the termination. CP 853. By taking this action, without asserting any right, EWU interfered and impacted Elcon's relationship with its bonding company. Because the letter raised the potential of a claim without actually doing so, Elcon's bonding capacity was impaired. (CP 855-856). Indeed, thereafter, Elcon was

unable to obtain a bond for anything other than “short duration” projects. CP 862.

The elements for tortious interference with a business relationship are well recognized. See Sintra, Inc. v. City of Seattle, 119 Wn. 2d 1, 28, 829 P.2d 765 (1992). Whether a business expectancy has been tortiously interfered with is generally an issue of fact for the jury to decide. See Quadra Enterprises, Inc. v. R.A. Hanson Co., Inc., 35 Wn. App. 523, 527 (1983), quoting Restatement (Second) of Torts § 767, Comment 1, at 38-39 (1979).

Here, the Trial Court found genuine issues of fact as to every element except damages. It granted EWU’s Motion for Summary Judgment based solely on its conclusion that Elcon failed to establish that a genuine issue of material fact with regard to damages. However, a review of the record confirms that genuine issues of material fact do exist with regard to the damages Elcon incurred.

Intentional interference is not limited to a formal “breach” or termination of the relationship. It is enough if the relationship has been injured. Pleas v. Seattle, 112 Wn.2d 794, 803-04 (1989). As a

public works contractor, this caused significant damage to Elcon. CP 856. Indeed, the effect of lost bonding capacity and its impact on the contractor has been recognized as a damage. See e.g., Allied Fire & Safety Equipment Co., Inc. v. Dick Enterprises, Inc., 972 F.Supp 922 (E.D.Pa. 1977)(lost bonding capacity determined to be a jury question); Laas v. Montana State Hwy. Comm., 483 P.2d 699 (Mont. 1971)(contractor's profit history supported a loss of bonding claim). Here, although it knew it was not making a claim, EWU chose to intentionally inject itself into Elcon's bonding relationship and impaired Elcon's bonding capacity.

Elcon presented admissible evidence that EWU injured its relationship with First National Insurance Company of America and Marsh, First National's agent, as a result of EWU's intentional and vindictive conduct. CP 862. When EWU intentionally provided First National with a copy of the letter claiming to "convert" the termination to one for default, it resulted in First National reducing Elcon's bonding capacity. CP 1247.

*Although you submitted your request with adequate time for the bonding company to review, the approval was delayed due to the number of underwriters involved because of the unknown*

*exposure that exists at EWU on the Wells project. ... the bond is approved on the condition that you limit your future bids to quick turn-around jobs such as this (90 days) until the pending issues at EWU become more clear.*

CP 1253. This admissible business record confirmed the damage EWU caused to Elcon's business relationship. Indeed, the amount of damages caused to Elcon was quantified as evidenced by the impact to Elcon's profits in 2004 and 2005. CP 1353.

As a result, based on the reasonable inferences to which Elcon is entitled, genuine issues of material fact exist with regard to the damages and EWU's motion for summary judgment should have been denied.

**5. Genuine Issues Of Material Fact Existed With Regard To EWU's Publication In A False Light.**

The original Trial Judge also found that genuine issues of material fact existed with regard to the elements of Elcon's Fraud and False Light allegations. CP 1018.

Yet, the new Judge granted EWU's Renewed Motion for Summary Judgment by finding that no genuine issue of material fact existed with regard to the publication element. However, the

evidence relied upon by Judge Rielly in his ruling confirms that a genuine issue of material fact exists.

After EWU received Elcon's claim based on the termination for convenience, it informed Elcon it was "converting" the termination to one "for cause." There was no legal or factual basis providing for such a "conversion". On October 22, 2004, EWU published information in a false light concerning Elcon by sending a copy of the "conversion" letter to First National Insurance Company and Marsh. CP 853; 862. In addition, EWU told other contractors that it was going to "take" Elcon's bond. CP 867. EWU chose to intentionally interfere with Elcon's business relationships by directly publishing the information to these parties. Finally, since EWU was a public agency, the letter became a public record that was viewed. Thus, EWU caused the information to be published to third parties.

**B. BY STATUTE, ELCON IS ENTITLED TO INTEREST ON THE PAY REQUEST THAT EWU FAILED/REFUSED TO PAY.**

**1. Prompt Pay Act Requires Public Works Contractors Be Paid Interest On Payments Not Timely Paid.**

Entitlement to an award of statutory interest on amounts found due is a question of law reviewed de novo. Meadow Valley Owners Assoc. v. St. Paul Fire & Marine Ins. Co., 137 Wn. App. 810, 816 (2007). The Trial Court incorrectly denied Elcon's motion for an award of statutory interest on the contract amounts EWU wrongfully withheld. The Trial Court erroneously concluded it lacked "jurisdiction" to award the statutory interest. CP 1020. It did so by concluding that the arbitration award was "*akin to a jury verdict*" and that the award amount was "*unliquidated until entered*". Id. However, Elcon's motion was not a request based solely on the fact the amounts withheld were a liquidated sum under common law. The Trial Court misunderstood and ignored the fact that the Arbitrator's decision also triggered a statutory right to interest. Thus, the statute provided the Trial Court jurisdiction and the obligation to award interest on the termination pay request amounts

found to be owed. RCW 39.76.010(1). Elcon's statutory claims were never "contract" claims submitted to the Arbitrator and thus remained for the Court to decide.

The Arbitrator ruled that EWU wrongfully withheld \$891,202.70 owed to Elcon under the terms of the parties' contract for the termination for convenience. CP 385. Once the issue of whether EWU wrongfully withheld payment was resolved in the Arbitration, Elcon's statutory right to interest was triggered. Therefore, Washington law required EWU to pay interest for the amounts due that it failed to timely pay. RCW 39.76.010(1).

*[E]very state agency and unit of local government shall pay interest at the rate of one percent per month, ... on amounts due on written contracts for public works ... whenever the state agency or unit of local government fails to make timely payment.*

Id. (emphasis added). The legislature made the payment of interest mandatory – "shall pay interest". Id.

In this case, Elcon submitted its pay request for the termination for convenience on June 4, 2004. CP 107. The Arbitrator confirmed that Elcon was owed payment under the contract based on the termination for convenience that was not

timely paid. CP 385. Consequently, when EWU failed to pay amounts due on the written contract for public works, Elcon became entitled to 12% interest on the amounts wrongfully withheld. RCW 39.76.010(1). Therefore, the Court should have awarded the Statutory interest that was mandatory under the Prompt Pay Act.

**2. The Trial Court Had Jurisdiction To Award Statutory Interest.**

**a. Elcon's Statutory Rights Were Not Submitted To Arbitration.**

This case is unlike most cases that are arbitrated. Unlike a typical arbitration, here only a small part of the dispute was initially submitted to arbitration. Specifically, the only issue was whether EWU had wrongfully refused to provide payment based upon its termination for convenience. In other words, the Court here did not divest itself of all jurisdiction over this matter. Indeed, Elcon's tort claims and statutory rights, if any, triggered by resolution of the termination for convenience dispute, were never submitted to the Arbitrator.

Elcon's Prayer for Relief in its Complaint requested "*pre-judgment interest as provided for by law*". CP 33. As such, the

parties did not submit the issue of interest to the Arbitrator to be decided. This is a fact that EWU does not and cannot dispute. See CP 385-386. As a result, once the Arbitrator decided the underlying factual dispute and confirmed that the termination pay request was wrongfully withheld, it was for the Trial Court that had retained jurisdiction, to award statutory interest on that amount. RCW 39.76.010. See also Threatt v. Forsyth County, 552 S.E.2d 123, 126 (2001)(Statutory Interest following Arbitration is appropriate when statute makes it mandatory).

**b. In The Alternative, The Trial Court Had Jurisdiction To Direct The Statutory Rights Be Decided By The Arbitrator.**

By taking the position that it lacked jurisdiction to rule on the issue of statutory interest, the Trial Court left Elcon without any forum to have its right to statutory interest adjudicated. It is undisputed that the issue had not been submitted to arbitration. If the Trial Court believed it was appropriate for this issue to be decided by arbitration, then it could have ordered that the statutory rights be stayed, pending a ruling by the Arbitrator. This could have been done by either ordering the issue to be decided by the same

Arbitrator, i.e. directing the Arbitrator to rule upon it, or having it submitted to a new arbitrator. Ruling as the Trial Court did, left Elcon without a forum and was error.

**3. In The Alternative, The Trial Court Should Have Remanded The Issue Of Interest To The Arbitrator.**

Arguendo, if the issue of statutory interest were directed to be determined in arbitration, the failure to award it constituted an err of law. RCW 39.76.010 – “*government shall pay interest...*”. The Arbitration Award established the “*total entitlement to recovery based on termination for convenience,*” but failed to address the issue of statutory interest based on the award of that contractual claim. CP 385-386. Accordingly, if the issue of statutory interest was considered as part of the arbitration, then on its face, the Arbitration Award contained a mistake of law that the Trial court retained jurisdiction to address. Boyd v. Davis, 127 Wn.2d 256, 263, (1995). Thus, the Trial Court had jurisdiction to direct the Arbitrator to correct that error of law or to do so on its own.

A Trial Court has authority to vacate all or part of an Arbitration Award in the event “*the arbitrator exceeded the*

*arbitrator's powers*". RCW 7.04A.230(1)(d). In such case, the Trial Court may direct a rehearing as to any such issue. RCW 7.04A.230(3). Here, if the issue of statutory interest were considered as having been submitted to the Arbitrator, then the Arbitrator exceeded his power by failing to award statutory interest on the unpaid amounts. See Philips Bldg. Co., Inc. 81 Wn. App. 696, 701 (1996) (Arbitrator exceeded his power by failing to award attorney fees to the prevailing party under an arbitration agreement).

Consequently, if the issue of statutory interest was deemed submitted to the Arbitrator, the Trial Court had retained jurisdiction to direct the Arbitrator to rule on the issue since it was not addressed by the Award and is mandatory under Washington law. It was error for the Trial Court to leave Elcon without a forum to address the issue of mandatory interest.

**4. If Statutory Interest Had Been Directed To Arbitration, Then the Arbitrator Had Jurisdiction To Consider The Issue.**

If the issue of statutory interest had been directed to Arbitration, it was clearly not addressed by the Award. In such a case, the Arbitrator had jurisdiction to modify or correct his award to

address the statutory interest triggered by his decision on the termination Pay Request. RCW 7.04A.200 provides an arbitrator with jurisdiction to modify or correct an award. This may be done if 1) "*the arbitrator has not made a final and definite award upon a claim submitted...*" or 2) "*to clarify the award*". RCW 7.04A.200(1). In this case, if the issue of interest were deemed directed into Arbitration, then the Award failed to address that claim. CP 385. Thus, the Arbitrator had jurisdiction to correct the Award and grant the Motion for Prejudgment Interest. The Court's conclusion to the contrary was error.

**5. The Trial Court Also Had Jurisdiction to Modify the Award.**

In addition to the above, Washington law also provides the Trial Court authority to modify or correct an award where "*the award is imperfect in a matter of form, not affecting the merits of the decision on the claims submitted.*" RCW 7.04A.240(1)(c). Here, the Arbitrator decided the amount owed for the termination for convenience pay request but did not address statutory interest triggered by the award. As a result, the Court had authority to "modify" the Award by awarding the mandatory statutory

prejudgment interest. RCW 7.04.170. Since the principal amount owed constituted the controversy that was submitted to the Arbitrator, the award of statutory interest as required by law, would not have affected the merits of the controversy. Accordingly, the Trial Court had jurisdiction to modify the Award, and committed error by ruling otherwise.

**V. ELCON'S RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS**

Pursuant to RAP 18.1 and RCW 39.76.040, Elcon moves the Court to award its attorneys fees and costs incurred on Appeal.

**VI. CONCLUSION**

Based upon the foregoing, Appellant Elcon respectfully requests this Court to reverse the Trial Court's decision granting Defendants' Motion for Summary Judgment regarding the fraud, tortious interference, and Publication in a False Light claims; and to

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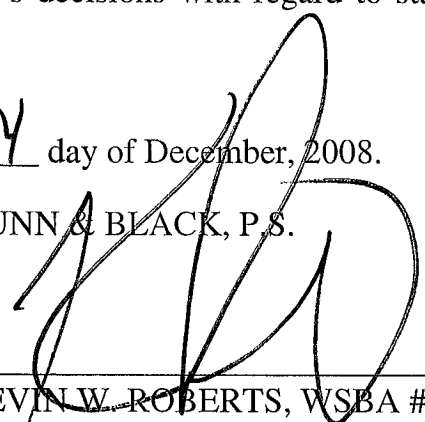
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reverse the Trial Court's decisions with regard to statutory interest  
owed.

DATED this 24 day of December, 2008.

DUNN & BLACK, P.S.



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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24<sup>th</sup> day of December, 2008, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/>	HAND DELIVERY	Jerry Cartwright
<input checked="" type="checkbox"/>	U.S. MAIL	Carl Warring
<input type="checkbox"/>	OVERNIGHT MAIL	Attorney General Office
<input type="checkbox"/>	FAX TRANSMISSION	Torts Division
<input type="checkbox"/>	EMAIL	1116 W. Riverside Avenue
		Spokane, WA 99201-1106

<input type="checkbox"/>	HAND DELIVERY	Catherine Hendricks
<input checked="" type="checkbox"/>	U.S. MAIL	Office of the Attorney General
<input type="checkbox"/>	OVERNIGHT MAIL	Torts Appellate Program
<input type="checkbox"/>	FAX TRANSMISSION	800 5 <sup>th</sup> Ave., Suite 2100
<input type="checkbox"/>	EMAIL	Seattle, WA 98104-3188

  
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KEVIN W. ROBERTS

- The Study included the findings of a hydrogeologic investigation conducted by Golder Associates, Inc. with the assistance and input of John Buchanan, Ph.D., EWU Department of Geology. The hydrogeologic investigation included a *“review of hydrogeologic literature, area well logs, water quality data, EWU and Cheney pumping and water level data, and discussions with EWU and Cheney staff; assessment of alternatives for expanding the groundwater supply on campus, including evaluation of well interface; and recommendations.”* CP 564.
- The Study explained, *“[s]ince regional geology indicates the Grand Ronde thickens in the southwest direction in the Cheney area, it is likely that the potential for a productive well also increases in this direction.”* CP 565.
- *“Although City Well No. 4 indicates a reasonable thickness (863’) of Grand Ronde basalt exists at this location, a reported lack of water in this formation (possibly due to the presence of fine grained interbeds) suggests that this often productive formation may not be as promising in the immediate campus area for groundwater supply development.”* CP 565.
- *“The hydrogeological potential for an adequate well is likely significantly greater one to three miles southwest of the campus than on campus.”* CP 576.
- *“Alternative 2: Develop additional groundwater supply ... this alternative includes three possible options, as shown below. Both new well options assume development of a single 500 to 1,000 gpm well developed in the Grand Ronde basalt formation to an approximate depth of 1,500 feet... .”* CP 578.
- *“Alternative 2A: Develop new well on campus ... in pilot hole, 8” x 1,500’... .”* CP 579.
- *“Alternative 2B: Develop new well off campus ... drill and develop production well (12” x 1,500’)... .”* CP 579.
- The Water Capacity Study also advised EWU that it should pursue the application it had filed with the DOE to increase its Water Rights. CP 588.

## APPENDIX A

- That the Wanapum and Grand Ronde basalt units “are separated in this area by the Latah formation, a sedimentary inter-bed deposited in streams and lakes during a period of quiescence between the salt eruptions.” CP 320.
- The investigation presented an “overview of the regional and local hydrogeology and focused on the local hydrogeology of the Wanapum and Grand Ronde basalts and the basement rocks since these are the aquifers from which the majority of the local drinking water supply is extracted.” CP 321.
- It identified that “based on local drillers’ logs for wells that penetrate into the Grand Ronde, the Latah inter-bed is likely to be continued in the Cheney area.” CP 323.
- “In the study area, depth to basement rock ranges from zero (Prosser Hill and Needham Heights areas) to 1,555 feet (city well 4) indicating that the basement rocks dip in a southerly and southeasterly direction beneath Cheney.” CP 324.
- “The alternatives considered herein [in the hydrogeological investigation] include: **increasing the capacity of existing EWU wells; and drilling a new EWU well.**” CP 334.
- “Regional USGS studies indicate that the Grand Ronde aquifer is a permeable aquifer capable of supplying large well yields. **However, Holman Drilling (the contractor that deepened city well No. 4 in 1991) believes that the Grand Ronde basalt in the Cheney area may have limited productivity because of the occurrence of fine grained inter-beds. This is supported by other drilling contractors and the city’s hydrogeological consultant, John Buchanan, who had advised the City of Cheney to drill south and west of the city for a reliable municipal water supply from the Grand Ronde.**” CP 338-339.
- “The major concern with this location is the reported lack of water in the Grand Ronde at city well 4 (see figure 9). **It is our opinion that there is a 20 to 30 percent probability of developing the required groundwater supply on campus from the Grand Ronde.**” CP 340.

CP 316-356(emphasis added).

## APPENDIX B

**RCW 39.76.010**

**Interest on unpaid public contracts — Timely payment.**

(1) Except as provided in RCW 39.76.020, every state agency and unit of local government shall pay interest at the rate of one percent per month, but at least one dollar per month, on amounts due on written contracts for public works, personal services, goods and services, equipment, and travel, whenever the state agency or unit of local government fails to make timely payment.

(2) For purposes of this section, payment shall be timely if:

(a) A check or warrant is mailed or is available on the date specified for the amount specified in the applicable contract documents or, if no date is specified, within thirty days of receipt of a properly completed invoice or receipt of goods or services, whichever is later.

(b) For any amount which is required to be withheld under state or federal law, a check or warrant is mailed or is available in the proper amount on the date the amount may be released under the applicable law.

[1981 c 68 § 1.]

**Notes:**

Application -- 1992 c 223: See RCW 39.04.901.

**RCW 7.04A.230**

**Vacating award.**

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

- (a) The award was procured by corruption, fraud, or other undue means;
- (b) There was:
  - (i) Evident partiality by an arbitrator appointed as a neutral;
  - (ii) Corruption by an arbitrator; or
  - (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
- (d) An arbitrator exceeded the arbitrator's powers;
- (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or
- (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(2) A motion under this section must be filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

(3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW 7.04A.190(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

**RCW 7.04A.200**

**Change of award by arbitrator.**

(1) On motion to an arbitrator by a party to the arbitration proceeding, the arbitrator may modify or correct an award:

(a) Upon the grounds stated in RCW 7.04A.240(1) (a) or (c);

(b) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(c) To clarify the award.

(2) A motion under subsection (1) of this section must be made and served on all parties within twenty days after the movant receives notice of the award.

(3) A party to the arbitration proceeding must serve any objections to the motion within ten days after receipt of the notice.

(4) If a motion to the court is pending under RCW 7.04A.220, 7.04A.230, or 7.04A.240, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(a) Upon the grounds stated in RCW 7.04A.240(1) (a) or (c);

(b) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(c) To clarify the award.

(5) An award modified or corrected under this section is subject to RCW 7.04A.220, 7.04A.230, and 7.04A.240.

**RCW 7.04A.240**

**Modification or correction of award.**

(1) Upon motion filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, the court shall modify or correct the award if:

(a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(2) If a motion filed under subsection (1) of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, the court shall confirm the award.

(3) A motion to modify or correct an award under this section may be joined with a motion to vacate the award.

[2005 c 433 § 24.]

**RCW 39.76.040**

**Interest on unpaid public contracts — Attorney fees.**

In any action brought to collect interest due under this chapter, the prevailing party is entitled to an award of reasonable attorney fees.

[1981 c 68 § 4.]